

Politics from Anarchy to Democracy

Rational Choice in Political Science

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Institutionalizing Constitutional Democracy

The Role of Courts

TRANSITIONS TO constitutional democracies are, as scholars have long recognized, ongoing and complex processes. While the basic framework of the democratic system is established by the enactment of a formal constitution, the fine-grained institutional structure evolves over time as the product of the legal and political interactions among various political actors. In principle, constitutional courts play an important role in this evolution, primarily through their authority to resolve constitutional disputes by interpreting the constitution's basic provisions.

In this chapter we investigate the role of constitutional courts in the development of constitutional democracies over time. More specifically, we demonstrate how strategic models of judicial decision making help us to build explanations of the role of courts in this historical process. The intuition that judges act strategically is an old one, traced back to the early work of Glendon Schubert (1958) and, most especially, Walter Murphy (1964). The recent revival of interest in the strategic behavior of judges is part of a broader emphasis on strategic analysis in the study of social and political institutions. It has taken many forms (game theory, spatial models, statistical analysis, historical research), but it rests on the basic proposition that judges often act strategically in the pursuit of various personal, policy, institutional, and jurisprudential goals (Epstein and Knight 1998.)

We proceed as follows. First, we briefly explain the logic of a strategic approach to judicial decision making. Second, we offer two examples of how such an approach helps to explain how constitutional courts can directly affect the development of constitutional democracies. Third, we discuss the implications of these analyses and the strengths and weaknesses of the approach.

The Strategic Approach to Judicial Decision Making

On the strategic account, (1) social actors make choices in order to achieve certain goals, (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors, and (3) these choices are structured by the institutional setting in which they are made (see, generally, Elster 1986).

GOALS

The strategic approach assumes that judges are goal-oriented. What it does not assume is that judges have any particular goal that they pursue. Under the strategic account, it is up to the researcher to specify a priori the actor's goals; the researcher may select any motivation she believes that the particular judge holds. Most of the existing research on the strategic behavior of judges posits that justices pursue policy, that is, their goal is to see law and public policy reflect their preferences. But this need not be the case (Baum 1997). Judges may pursue an array of possible goals. They may, for example, be motivated by a concern for institutional legitimacy, causing them to either select or avoid cases based on their potential to influence the long-term legitimacy of the courts. Or they may be motivated by a concern for adhering to particular jurisprudential principles, such as original intent or plain meaning. The only relevant constraint placed on judicial motivations by the strategic approach is that judges desire to be efficacious, in the sense that they want their goals instantiated in the nature and content of the law over time.

INTERDEPENDENCE

A judge faces an interdependent choice whenever the outcome that follows from that choice depends on the choices of other legal and political actors. While varying with the particular type of court on which the judge sits, the number of actors on which the outcome depends may be substantial. Consider the justices on the U.S. Supreme Court. For an individual justice on the Court, there are three sets of actors whom she must consider in assessing the implications of her own choice for the ultimate legal outcome: the other justices on the Court, the relevant actors in the other branches of government, and the American people. For each of these groups, the choices of the other actors affect the ability of the individual justice to achieve her goals. In regard to the other justices, the interdependence is straightforward; the Supreme Court's decision is a product of the choices of the nine justices. In regard to the other branches of government, the interdependence is a function of the checks and balances established in the constitutional scheme of separation of powers. In regard to the American people, if the Court is

going to be effective in establishing its decision as the law which the public will accept and comply with, it must take account of the potential responses of the public to its decisions.

A simple example will demonstrate the implications of interdependence for the nature of a strategic judge's choice. In offering the example we want to clarify the difference between the strategic decision-making model and an alternative account, the attitudinal decision-making model, to which it is often mistakenly compared.¹ The attitudinal model predicts that judges base their decisions on their normative and policy-based attitudes, without attention to the implications of the choices of the other justices. The fact that the attitudinal approach does not acknowledge a strategic component to decision making leads to very different predictions about judicial behavior.

Consider the following example. Suppose a justice must choose one of three alternative standards of review to apply in abortion cases. Further suppose that she sincerely prefers "compelling interest" (least restrictive standard) to "undue burden" (moderately restrictive standard) to "rational basis" (most restrictive standard). Theoretically speaking, if she is motivated in the way assumed by, say, those attitudinal models that suggest a direct connection between personal attitudes and voting, the prediction is simple enough. She would always choose "compelling," regardless of the positions of her colleagues. That is because she makes decisions that are in accord with the background characteristics that produce her attitudes—characteristics that do not change after she has ascended to the bench. The strategic account, on the other hand, supposes that the justice might choose "undue burden" if, depending on the preferences of the other players (e.g., her colleagues), that would allow her to avoid "rational basis," her least preferred outcome.

INSTITUTIONAL CONTEXT

The interdependent decisions that judges face are structured by the institutional setting in which they are made. Goal-oriented judges face complex strategic decisions in their efforts to affect the law. In the case of the U.S. Supreme Court, the justices must take account of three different strategic relationships: the relationships among the justices, of the Court to the other branches of government, and of the Court to the public (Epstein and Knight 1998). Their success in crafting particular laws depends on their ability to anticipate the reactions of the other actors in their decisions. That is, the effectiveness of an individual justice depends on how skillful she is in developing reliable expectations of the actions of others. It is in this task of expectation formation that social, legal, and political institutions play a crucial role.

On this strategic account, institutions are treated as rules, rules that structure the various relationships involving judges. Rules help strategic actors by providing information about how people are expected to act in particular

situations (Knight 1992). For example, certain expectations are established by the rules of the road; we cannot drive safely unless we know what to expect from others at lights and stop signs. Court rules perform the same kind of function.

For institutions to play this role, however, two conditions must hold. First, only those rules that are widely known and generally accepted by members of the community will be effective. When knowledge of the rules is socially shared, people have a common basis for anticipating the choices of other actors. This is not to say that rules determine exactly what people are going to do—a driver may not stop at a red light—but rules establish the constraints on the range of acceptable behavior. Second, before an individual can confidently rely on institutional rules as a basis for expectation formation, she must have good reason to believe that other actors will comply with them. If she is confident that others will comply, then she can use the rule to establish expectations about how others will act and respond to her actions. The most common situation in which these two conditions are satisfied is the case of pure coordination. In such a case, the information alone is enough to ensure compliance because the information gives the actors an incentive to comply with the rules. This is the logic of self-enforcing institutions and the primary mechanism of compliance for informal conventions and norms.

But in situations where the interaction is more complicated than the case of pure coordination, information alone may not ensure compliance. In this type of situation, sanctions become important. Two types of sanctions, formal and informal, are relevant to our analysis. Formal sanctions are attached to a state's legal rules; if an actor does not comply with the law, public officials may punish him. In the case of Supreme Court justices, impeachment is an extremely severe form of sanction for noncompliance with the law. Informal sanctions are attached to the various conventions and norms that evolve over time to structure social relations. If an actor does not comply with these social norms, it is likely that the other actors will apply informal sanctions, which can range from ostracism to a refusal to interact cooperatively with the offending party. Such norms and the accompanying sanctions are the primary sources of institutional constraint on Supreme Court justices. If a justice occasionally violates a norm, the other justices can invoke simple forms of informal sanctioning as a way of reinforcing the validity of the norm. For example, when a chief justice violates the opinion assignment norm by selecting a writer from among the members of the minority, justices in the majority may temporarily challenge his authority. But if a justice (or a group of justices) consistently fails to conform to prevalent legal norms, the informal sanction might be outright rejection of her decisions, resulting in her loss of legitimacy and, ultimately, her efficacy. In either case the pri-

mary effect of sanctions is to increase the costs and diminish the benefits of noncompliance with institutional rules.

In developing an analytical framework for studying the strategic behavior of judges, the institutional context in which the judges act is a fundamental feature of that framework. We must take account of the internal rules relevant to collegial courts, where applicable, as well as the external rules, both laws and norms, that structure the relationship between courts and other social actors.

Constructing Explanations of How Constitutional Democracies Develop Over Time

In order to effectively use the strategic approach to develop explanations of how constitutional democracies develop over time, it is necessary to identify the following features of the process or outcome to be explained: (1) the goals and beliefs of the judges, (2) the goals and beliefs of the other relevant actors, and (3) the institutional context in which the judges make their decisions. If these factors can be properly identified, then the strategic approach can be employed for a wide range of explanations about the court's role in a constitutional democracy. In this section we offer two sketches of how the strategic approach can explain how courts affect the institutionalization of constitutional democracies. They differ in the level of generality sought in the explanation. The first example is an effort to develop a general framework for analyzing how courts interact with the other branches of government to establish the basic institutional structure of the democratic system. The second example is more specific, an effort to construct an explanation of a particular historical event in the more general institutional process. In the two examples we employ different analytical tools, demonstrating some of the variety of methods available for developing strategic explanations.

A GENERAL FRAMEWORK

Epstein, Knight, and Shvetsova 2001 proposes a general approach for assessing the role of constitutional courts in the establishment and maintenance of constitutional democracies. It is intended to generate testable propositions about judicial decision making in emerging democratic societies. As we noted in the introduction, the process of institutionalizing a constitutional democracy is a complex one, and courts can have a significant effect on that process through their authority to resolve constitutional conflicts. But the court's capacity to effectively use this authority is, in important ways, a function of its legitimacy. It is to the question of the effects of the legitimacy of the constitutional court that this approach is specifically addressed.

The basic idea underlying this approach is that the legitimacy of any constitutional court is in significant part a product of the ongoing strategic interactions between the court and the other branches of government. These interactions can be modeled as a strategic game among the three branches. For this particular analysis, we constructed a model of the Russian constitutional system, but the model could be adapted to take account of the specific characteristics of any constitutional democracy. This model takes the form of a strategic interaction between a constitutional court (CC) and three elected actors: a president (P); an upper chamber (UC) of parliament, with representatives from each region within the society; and a lower chamber of parliament (LC), which is drawn nationwide. The interaction between the court and these other actors begins with CC deciding whether to take a case involving a particular policy issue and, if it accepts the case, where to place the policy. After CC makes this decision, the other actors must decide (1) whether to modify, override, evade, or otherwise disregard CC's decision and (2) whether to directly affect CC in some other way. These sorts of "attacks," we assume, may have short- and long-term effects on the court. In the short term, they may nullify or render inefficacious particular decisions (Esckridge 1991a, 1991b; Vanberg 1999). In the longer term, they may chip away at the court's legitimacy; that is, their impact may accumulate over time such that CC itself becomes an ineffective political institution (Ahdieh 1997; Gibson, Caldeira, and Baird 1998; Knight and Epstein 1996).

We further assume that all actors involved in this interaction have positions, what we call "most preferred positions," over a given policy space, that is, the position where they would ideally like to see government policy placed. Figure 8.1 depicts these points over a two-dimensional space in an environment in which the actors' preferences are separable and utility functions are linear. Each dimension represents a range of solutions to a constitutional question potentially facing the court. The general framework is applicable, in principle, to any such question. For purposes of this example, we have chosen two general institutional dimensions which are likely to face any constitutional court in an emerging democracy: separation of powers and federalism. As illustrated, the president (P) and the upper chamber (UC) and lower chamber (LC) hold distinct positions on the separation-of-powers dimension, with P favoring a strong executive system and the chambers preferring one that endows significant authority to the parliament. CC is between the two on this dimension; it also takes a middle position, somewhat between P and the LC on the one side and UC on the other, on the federalism dimension, which taps the extent to which actors desire a government that is centralized (at one extreme) or decentralized (at the other).

All actors prefer policy that is as close as possible to their ideal points, but they are not unfettered in their ability to achieve that goal. Beginning with

Federalism

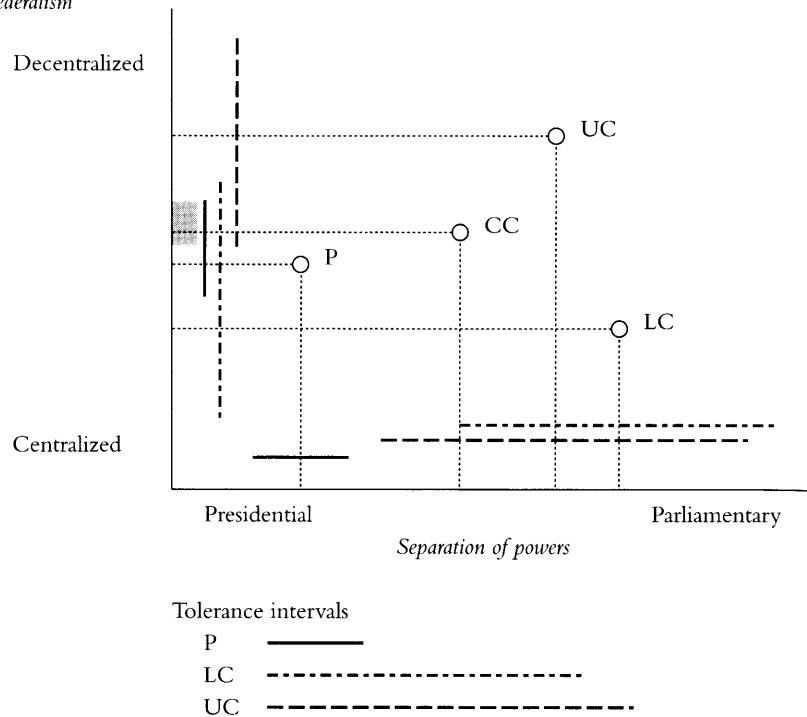


FIGURE 8.1 Hypothetical set of preferences and tolerance intervals of key governmental actors

the elected actors, because they may incur costs associated with challenging a decision produced by the court (Eskridge 1991b; Rodriguez 1994), they may be willing to tolerate policy that is not on their ideal points. Specifically, an interval—what we called a tolerance interval—exists around each of their ideal points such that they would be unwilling to challenge a court decision placed within that interval.

Those intervals, which the figure depicts for the president and the upper and lower chambers and which are common knowledge among them and the constitutional court, represent the elected actors' *ex ante* assessment of the relative costs and benefits of attempting an "attack" on the court. To make that assessment, as previous literature suggests, these actors take into account four factors, some of which speak to the particular case at hand and others, to the court itself: (1) case salience—the degree to which the case under consideration by the court is especially relevant or important to them (e.g., Canon and Johnson 1998; Epstein and Knight 1998; Vanberg 1999); (2)

case authoritativeness—the ability of the justices to produce a clear, consensual ruling in the general legal area at issue in the dispute (e.g., Eskridge 1991a; Kluger 1976; Murphy 1964); (3) public (specific) policy preferences—the position of the public, in policy space, with regard to particular matter under review (e.g., Barzilai and Sened 1997; Vanberg 1999); and (4) public (diffuse) support for the court—the confidence the public has in the court (e.g., Caldeira 1987; Gibson 1989, 1991; Holland 1991; Vanberg 1999). Each, in turn, serves to define the breadth of tolerance intervals over a particular court decision, such that (1) the less salient the case, (2) the more authoritative past decisions within the general issue area, (3) the closer the court's policy is to the public's preferences, and (4) the more confidence the public has in the court, the longer the tolerance interval (and vice versa).

For policies falling within their tolerance interval, the actors have calculated that the benefits of acquiescing to the court's decision override the cost of an attack; for policies falling outside the interval, they have determined that the benefits of an attack outweigh the costs of acquiescence; and for policies at the extreme ends of the interval, they are indifferent between attacking and not so doing. Note, though, that the inclusion of the confidence dimension ensures that the judges on the court can contribute to the court's own well-being. If the judges are attentive to the preferences of relevant actors, then their institution's legitimacy should increase over time, assuming that they reach decisions that other actors accept and with which they comply. In our model, this requires the court to either reach decisions that are within the intersection of tolerance intervals or avoid disputes for which no intersection exists. What this, in turn, suggests is that tolerance intervals can increase (or decrease) over time, quite apart from the particulars of a dispute (Ahdieh 1997; Caldeira 1987).

Finally, given that attacks on the court may have both short- and long-term effects on its ability to establish efficacious decisions and, more generally, its legitimacy in society, the court itself is constrained by the existing tolerance intervals of the elected actors. If, for example, CC places a case on its agenda and decides that dispute outside a range acceptable to these actors, it runs the risk of producing a decision that the president, lower chamber, and upper chamber will attempt to overturn or ignore; if such decisions accumulate, they may work to undermine CC in the eyes of, say, the public, thereby shortening the elected actors' tolerance intervals over the long term. That is because, to reiterate, the elected actors construct their tolerance intervals with some attention to the public's overall (or diffuse) support for the court, and not just on the basis of those factors relevant to a particular dispute (Caldeira 1987; Smith 1996). On the other hand, if the court over time accepts and decides cases within the overlap of the tolerance ranges, not only will the elected actors implement those decisions but there also will be a cu-

mulative effect on the court's legitimacy and its ability to maximize its policy preferences; in the long run, the tolerance intervals will expand, thereby giving CC a good deal more leeway, both in terms of case selection and decision making (Epp 1998; Caldeira 1987; Volcansek 1991).

Figure 8.1 enables us to explore these conditions. Consider, first, the separation-of-powers dimension. In this example, the intersection of the tolerance ranges is empty, meaning that the court is maximally constrained. Any decision may be subject to attack by one or more elected actors. Because, under such circumstances, CC cannot safely issue any ruling on the merits, we would expect to see it avoiding such disputes—that is, not accepting them for review, much less resolving them on their merits. Federalism presents a different story. On this dimension, the intersection of the tolerance ranges is nonempty (represented by the gray area in the figure), suggesting that the CC could place policy anywhere in this set. Even more to the point, since the court's ideal point falls within the intersection, it is able to act as if it were an unconstrained actor—not only accepting federalism cases but deciding them as it desires.

From this relatively simple model emerge several rather intriguing conceptual predictions about the ability of constitutional courts to establish legitimacy and credibility within their societies. The first set of predictions centers on the short term. If courts wish to issue efficacious decisions, then they will not accept petitions for review that involve policy dimensions for which an intersection of tolerance ranges does not exist; so doing would lead elected actors to challenge them or their decisions. Rather they will accept cases involving policies for which the tolerance set is nonempty and will reach decisions, within that set, that are as close as possible to their ideal points.

The second set of predictions focuses on the longer term. If courts agree to resolve disputes that involve policy dimensions for which an intersection of tolerance ranges does not exist and do so repeatedly over time, then they shorten those tolerance ranges. This, in turn, makes it more difficult for them to exercise discretion over case selection (as well as to issue decisions in line with their policy preferences) and to establish their legitimacy. Alternatively, if courts accept cases involving policies for which the tolerance set is nonempty and reach decisions within that set, then they lengthen the tolerance intervals. Such has the effect of making it easier for them to exercise discretion over case selection and, in turn, to issue decisions in line with their policy preferences and establish their legitimacy.

Taken collectively, these hypotheses have direct bearing not only on case-level decisions but also on the aggregate level. We should see particular kinds of disputes dominating courts' agendas (in our example, federalism), with others (in our example, separation of powers) remaining unresolved—at least

until the actors' preferences change or the tolerance intervals alter in length. While some portion of these changes may be beyond the control of the justices (such as, turnovers in the parliament or presidency), they can affect the other by taking into account the preferences of the relevant actors.

There are three compelling features of the predictions generated by our model. First, we can assess them in various contexts. That is because the predictions (1) are not, in the main, bound to any particular society—be it an established democracy or democratizing society—and (2) seek to capture the process by which judicial tribunals establish and maintain legitimacy—a process with which all courts grapple (Goebel 1971; Knight and Epstein 1996). Second, the predictions sit comfortably with existing literature, that is, they square with the insights generated by a range of studies—from those that focus on public opinion (Gibson, Caldeira, and Baird 1998) to formal (Barzilai and Sened 1997; Eskridge 1991a, 1991b; Knight and Epstein 1996; Vanberg 1999), statistical (Spiller and Gely 1992; Vanberg 1999), and jurisprudential (Ahdieh 1997; Smithey 1999) treatments of judicial decision making.

Third and related, a good deal of anecdotal evidence exists to support the predictions our model generates. Some of this comes from the U.S. context, specifically from studies of the early Supreme Court, which show that the justices would have been unable to establish efficacious policy had they failed to take into account the desires of other key actors and the nature of the political environment under which they were operating (Alfange 1994; Epstein and Walker 1995; Graber 1998; Knight and Epstein 1996). In the next section of this chapter, we illustrate this dynamic with a game-theoretic treatment of a seminal case in the development of the Supreme Court—*Marbury v. Madison*. We show how the establishment of the prerogative of judicial review depended upon a constellation of preferences among key political actors that was conducive to the extension of judicial authority.

Evidence for the significance of the preferences of key political actors for the extension of judicial authority also emanates from the comments of various contemporary constitutional court justices, both in emerging and established democracies, which lend credence to the notion that they do, in fact, take into account external political actors when they set their agendas and reach their decisions, as well as acknowledge the importance of cultivating the public's confidence (e.g., Ahdieh 1997; Attanasio 1994; Nikitinsky 1997; Reid 1995; Vanberg 1999). There also is scattered support for the idea that elected officials may be willing to tolerate court decisions that do not fall on their ideal points. Georg Vanberg's (1999) interviews with members of the *Bundestag* provide some, as does commentary offered by observers of the Eastern European political scene (e.g., Savitsky 1995; Waggoner 1997). Finally, in an effort to assess the research potential of the model, we did a

preliminary analysis of the decisions of the Russian constitutional court in the 1990s. While the analysis was very tentative, it did show that the trajectory of decisions of the Russian court during this period was quite consistent with the predictions of the model.

More generally, this analysis has important substantive implications for questions about the role of constitutional courts in a democratic society. In the initial stages of the transition to a constitutional democracy, if the legitimacy of the constitutional court is low, as will commonly be the case, the court is caught in an uncomfortable dilemma. At a time when the emerging democracy is most in need of a way of resolving basic constitutional questions, such as the distribution of authority among the branches of government, the court is least able to do so effectively. That is, for courts that are concerned about establishing their own long-term authority and power in their constitutional systems, they will be least willing to consider basic questions about the authority and power of the other branches of government.

And this suggests a potentially fundamental point about the role of these courts in the early stages of transition to a constitutional democracy. Their primary role will be to reinforce those features of the constitutional system about which there is already substantial agreement. As for those issues about which there is greater disagreement, new constitutional courts will leave those for another day, either for the day when these issues have been resolved through political agreement by the other branches or when the courts themselves have solidified their own place in the constitutional system.

A SPECIFIC HISTORICAL CASE

In Knight and Epstein 1996, we use game theory to analyze a critical event in American history: the struggle between President Thomas Jefferson and Chief Justice John Marshall in the early 1800s that led to the enunciation in *Marbury v. Madison* (1803) of the Supreme Court's power of judicial review. The sequence of interactions between Jefferson and Marshall is characterized by many of the conditions that prove fundamental in the general framework discussed above.

At issue in *Marbury* were several judicial appointments that President John Adams had made but that the incoming president, Jefferson, refused to deliver. When William Marbury, who was denied his commission, brought suit, the Supreme Court, led by Chief Justice Marshall, had to decide whether to force the new administration to deliver the commission. Certainly Marshall, himself an Adams appointee, wanted to give Marbury his appointment. But at the same time, Marshall was well aware of the serious repercussions of ordering the administration to do so. Jefferson made no secret of his disdain for Marshall; he had threatened to impeach some of the justices or weaken the Court in other ways. Marshall was confronted with a

dilemma: vote his sincere political preferences and risk the institutional integrity of the Court and possibly his own job, or act in a sophisticated fashion with regard to his political preferences and elevate judicial supremacy in a way that Jefferson could accept.

As this set of events is taught in American government, judicial politics, and constitutional law courses and as it is treated in scholarly accounts and textbooks, Chief Justice Marshall generally emerges the victor because the dispute over the commissions was resolved without injury to the Court and, more important, the principle of judicial review was established. Yet scholars posit a range of reasons for Marshall's success; they also disagree over why both Marshall and Jefferson took the strategic paths they did (see, e.g., Alfange 1994; Boyd 1971; Dewey 1970; Stites 1981). Our use of a game-theoretic framework permits us to disentangle competing claims and explanations in a highly systematic way. Our analysis allows us to assess factors fundamental to most explanations of the Jefferson-Marshall conflict: the political and institutional preferences of the actors, the strategic structure of the political interaction in which the constitutional dispute arose, and the larger political environment in which the conflict took place.

In Knight and Epstein 1996 we modeled the Jefferson-Marshall conflict as an extensive-form game. In the course of the analysis we constructed two versions of the game, the difference being in the assumption we made about Jefferson's preferences about judicial review. A detailed analysis of the two versions of the game is beyond the scope of this chapter.² But for our purposes here, the primary reason for discussing the game is to demonstrate how strategic analysis can be used to enhance our explanations of historical events.

Historians disagree over whether Jefferson supported or opposed the practice of judicial review, so we analyzed the game under both assumptions. We posited two classes of motivations, the political and the institutional. By political, we meant that the actors cared about the advancement of their partisan causes and their parties. In this context, there were two relevant political factors. The first involved the resolution of the problem of the appointments and presented two alternatives: appointments going to the Democratic-Republicans (as desired by Jefferson) or to the Federalists (as desired by Marshall). The second—involving the consequence of Jefferson's use of the impeachment strategy—also presents two alternatives: success or failure on Jefferson's part if he tried to invoke it.

By institutional, we meant that the actors were concerned with the relative power and authority of the political branches of government. In this context, two aspects of the judiciary were at issue: its structure (the Repeal and Amendatory Acts, which attempted to restructure the federal judiciary in ways closer to the interests of the Democratic-Republicans) and its su-

premacry (judicial review). On the structural dimension, the alternatives were successful establishment of the Repeal Act, the status quo, and the unsuccessful attempt to establish the Repeal Act. On the judicial review dimension, the alternatives were establishment of judicial review, the status quo, and failure to establish judicial review.

The historical record suggests that Marshall and Jefferson were differentially concerned about these various dimensions (see, e.g., Beveridge 1919; Haskins and Johnson 1981; Malone 1970; Warren 1926). Given our extensive review of the historical sources, we ranked the dimensions as follows for the two actors: Marshall (judicial supremacy > judicial structure > political) and Jefferson (judicial structure > politics > judicial supremacy). With these assumptions we constructed utility functions for both actors.

In addition, we needed to incorporate the fact that the Jefferson-Marshall conflict took place in a political context in which the actions of Congress affected the likelihood that either actor would successfully achieve his goals. More specifically, Jefferson's success in any effort to impeach Marshall was a function of the political actions of members of Congress, and neither Jefferson nor Marshall knew with certainty what Congress would do if Jefferson attempted impeachment. Rather, they had at best a belief that there was a particular probability that Jefferson would be successful. To capture these probabilities, we distinguished two states of the world at each node at which Jefferson attempted impeachment: a political environment in which Jefferson would be successful in his impeachment effort and one in which he would fail. In assessing the relative merits of the various strategies available to them, both Jefferson and Marshall had to base their decisions on assessments of these probabilities.

Through the use of the two game-theoretic models, we sought to test the plausibility of different historical claims about why the Marshall-Jefferson conflict produced the outcome that it did. But, it is worth stressing, we used the idea of testing loosely. What our study attempted to do was to take advantage of the fact that game theory involves counterfactual analysis.³ That is, the solutions to these models entail claims about what actors will do under certain conditions and what they would have done differently if the conditions were different. By varying the relevant conditions in the game, we could assess the relative merits of the historical counterfactuals that underlie the different explanations of this period.

In making such assessments, our primary focus was on those conditions inducing equilibrium behavior that replicated historical events. If a model induces behavior similar to the historical choices we observe, then it highlights the importance of the conditions that produced the behavior. If a model fails to reconstruct previously observed events, then it calls into question explanations based on the conditions embedded in it. While replication

alone does not definitively answer the question of why an event occurred, it can lend strong support to the explanation at hand.

The solutions to the two games identified several equilibria that were characterized by different sets of assumptions about the actors' preferences and about their beliefs about the political environment in which the conflict took place.⁴ These assumptions can be associated with various explanations offered by historians of the period. The equilibria that most closely replicated the actual historical pattern of events—Marshall denies Marbury the commission, the Repeal Act is established by Congress and affirmed by the Court, Jefferson chooses not to act against Marshall, and the Court successfully asserts the power of judicial review—is supported by the following important assumptions: Jefferson was not opposed to judicial review, and both Jefferson and Marshall believed that the political environment of the day favored Jefferson's interests.

This leads us to the following conclusion. The political conflict between Jefferson and Marshall exemplifies the dynamic and incremental nature of the process of institutionalizing democracy. At the time of the framing of the U.S. Constitution, the role of the judiciary in the three-branch structure of American democracy was underdeveloped. The major long-term consequence of the Jefferson-Marshall interaction was a restructuring of the institutional division of labor among the branches. And this was, in large part, a result of the short-term political interests of the two major political parties. The Supreme Court's authority for judicial review emerged, not because of some complex intentional design and not because of some brilliant strategic move by Marshall in the face of overwhelming political opposition, but merely because it was politically viable in the existing environment. Put simply, Marshall took the actions that he did because it was the best he could do at the time.

Discussion

Constitutional democracies are not so much designed and planned as they are the product of a complex web of legal and political interactions. And these interactions are characterized by mixed motives on the part of the relevant actors; while they seek to establish an institutional solution that can be accepted by all of the parties, they prefer an outcome that favors their own institutional and policy interests. The task of explaining the development of constitutional democracies over time is primarily a task of understanding how these various interactions affect the evolution of democratic institutions.

The analyses that we have discussed here identify an important role for constitutional courts in that historical process. But they also identify a set of

significant political constraints on the efficacy of these courts' efforts. The resulting picture is of a set of justices who act in a strategic and often highly political manner in their effort to interpret the constitution and to resolve constitutional disputes. While it might seem obvious to many that law is politics and courts are political actors, these analyses do more than reinforce this view. The strategic approach helps us to identify the particular causal mechanisms that are a necessary part of any adequate explanation of how and why the courts may or may not affect the evolution of democratic institutions at any specific historical moment.

In the theoretical analysis of the separation-of-powers scheme in an emerging democracy, the formal model was used to generate testable propositions about the short- and long-term choices of courts and about the interactive effects of the separation-of-powers system on the development of legal institutions. In the historical analysis of *Marbury v. Madison*, the game-theoretic model was used to assess counterfactual claims about the legal and political interactions that resulted in the norm of judicial review. The primary contribution of the strategic approach in both of these cases is to identify and analyze in a systematic way the interdependent dimension of the interplay of goal-oriented actors.

At the same time, these analyses illustrate the importance of combining rational choice models with other methods and approaches in order to provide complete and adequate explanations of these historical processes. Fundamental to the development of such explanations is an account of the preferences and beliefs of the actors and the institutional context in which the decisions are made. The plausibility of the explanation depends in large part on the relationship between the assumptions made about the factors in the models and the actual circumstances that we seek to explain. For explanations of particular historical events such as the Jefferson-Marshall conflict, the relationship between assumptions and actual circumstances is of paramount importance. The requirement in such cases that the preferences and beliefs posited by the model be empirically accurate is obviously a stringent one. For example, the plausibility of the explanation of the emergence of the norm of judicial review is contingent on the plausibility of the claims about preferences and beliefs.

On the other hand, for theoretical analyses such as the model of the separation-of-powers system, the relationship between the assumptions of the model and actual circumstances is more complicated. The purpose of models like the separation-of-powers model discussed in the previous section is to provide a framework for a general analysis of legal and political institutions and for broader analyses of legal and political processes. Such analyses produce a variety of claims that can be differentiated in terms of potential sets of preferences and beliefs. At the theoretical level, concern about the

empirical accuracy of the assumptions is of less immediate relevance, as the primary focus is on the logic of social and institutional processes. The relationship between assumptions and actual circumstances becomes increasingly relevant when we want to assess the empirical plausibility of these claims. Then the relevant question becomes, for what sets of actual circumstances are the general theoretical claims appropriate? If there are important sets of actual circumstances that match the assumptions on which the claims are based, then the propositions generated by the model are relevant for explanations of actual legal processes.

Now, what this suggests is that in the construction of explanations of law and judicial decision making, the strategic approach will be to a greater or lesser extent dependent on other approaches for the provision of relevant evidence of the nature of preferences, beliefs, and institutional context. This fact seems to form the basis of a common criticism of rational choice approaches to law, that rational choice approaches may be appropriate but for rather limited and unimportant factors. In this form the criticism implies that explaining and providing evidence of the nature and content of preferences and beliefs is the hard work and the most important part of an explanation of judicial decision making. But this view underestimates the fundamental importance of the social interactions that affect how preferences and beliefs lead to legal and political outcomes. The two cases of legal and political decision making discussed in the previous section provide but two examples of the crucial effects of interactive choice on legal outcomes. Knowledge of the content of preferences and beliefs alone would not, in and of itself, lead to adequate and plausible answers to the questions under consideration in these examples.

The central role of social interdependence in law in general and the courts in particular provides the primary justification for the strategic approach to law and judicial decision making. In our efforts to understand the role of courts in the development of constitutional democracies over time, the importance of understanding the legal and political interactions that produce change in the system cannot be underestimated. Such a focus serves to highlight the central role of constitutional courts in this historical process.

Notes

1. For a comprehensive analysis of the differences between attitudinal and strategic approaches in the social sciences, see Barry 1978.
2. See Knight and Epstein 1996 for a presentation of the formal model of the two games.
3. For an excellent and informative discussion of the role of counterfactual reasoning in game-theoretic analysis, see McCloskey 1987.

4. It is important to note that when we use game theory to assess the merits of historical explanations, the key to the analysis is the way in which we define the conditions of the game (including the definition of the actors' preferences). From the very logic of this form of analysis, it follows that the solutions to games will be sensitive to changes in the conditions that are posited in the particular model. Thus a valid criticism of the kind of analysis we presented in this paper would not rest on the fact that the solution of any model is sensitive to changes in the parameters. Rather, an appropriate criticism would focus on weaknesses in the historical claims that we incorporate in the definitions of the conditions of the game.

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